11 U.S.C. § 330
attorney fees

United States Trustee v. Garvey, Schubert, 9th Cir. No. 98-35027
In re Century Cleaning Services, Inc., Case No. 395-36126-elp7

11/18/99	Ninth Circuit (reversing BAP, which had affirmed ELP)	Published 1999 WL 1041832

The Ninth Circuit reversed the BAP, 215 B.R. 18, which had affirmed the bankruptcy court's decision, 202 B.R. 149, and held that, under Bankruptcy Code § 330, chapter 7 attorneys are entitled to be paid from the estate for services performed postpetition. The court held that the deletion of "debtor's attorney" from the list of persons entitled to compensation from the estate was a drafting error and that Congress intended that chapter 7 debtor's counsel be among those professionals who can be compensated for their postpetition services from the estate.

In re CENTURY CLEANING SERVICES, INC. Debtor,
United States Trustee, Appellant,
v.
Garvey, Schubert & Barer; Michael Batlan, Trustee, Appellee.

No. 98-35027.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 12, 1999

Filed Nov. 18, 1999

Frank W. Hunger, Assistant Attorney General, William Kanter, and Steve Frank, U.S. Department of Justice, Washington, D.C., for the appellants.

Charles C. Robinson, Garvey, Schubert & Barer, Seattle, Washington, for the appellees.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel. Hagan, Naugle, and Jones, Judges, Presiding

Before: Betty B. Fletcher, Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

REINHARDT, Circuit Judge:

***1** In this appeal, we consider whether the 1994 amendments to the Bankruptcy Code preclude a Chapter 7 debtor's attorney from receiving professional fees from the bankruptcy estate for post-petition services. We conclude that a debtor's attorney may receive such fees pursuant to 11 U.S.C. § 330, and therefore reverse the contrary determination of the Bankruptcy Appellate Panel.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 8, 1995, Century Cleaning Services (Century) filed a Chapter 11 bankruptcy petition. On the same day, the law firm-appellee in this case, Garvey, Schubert & Barer (Garvey), filed an application with the bankruptcy court seeking appointment as counsel for Century, a debtor-in-possession. The bankruptcy court granted the application. The firm also filed an affidavit stating that it had received a retainer of $27,860.34 from Century for post- petition legal services and expenses. Garvey already had been compensated for all of its pre-petition services.

On September 22, 1995, Century's case was converted to a Chapter 7 bankruptcy, and the court appointed a trustee. Garvey continued to provide legal services for Century, including filing the conversion petition, preparing schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicating with creditors, and participating in 2004 examinations. Garvey, however, did not request reappointment as Century's attorney for the Chapter 7 proceedings.

On June 10, 1996, Garvey filed a fee application for "Chapter 7 attorney's fees and expenses for services from September 22, 1995-April 30, 1996" totaling $12,770.87. On June 13, 1996, the Chapter 7 trustee filed a notice of intent to allow Garvey to be compensated from the retainer funds. Upon review, the U.S. Trustee filed an objection, stating that the Bankruptcy Code, 11 U.S.C. § 330 in particular, did not permit attorney's fees to be paid out of estate funds. In response, Garvey contended that its services were necessary to the administration of the estate as the services were performed at the request of the bankruptcy court, the Chapter 7 trustee, and one of Century's creditors.

The bankruptcy court held that the Bankruptcy Code did not authorize payment to Garvey because Congress had recently amended § 330 to omit the term "debtor's attorney" from the list of professionals eligible for compensation under the statute. See In re Century Cleaning Servs., Inc., 202 B.R. 149, 151 (Bankr.D.Or.1996). Nonetheless, the bankruptcy court held that Garvey had a valid state law lien on Century's retainer, and thus that Garvey could recover "reasonable fees." See id. at 153. The court awarded Garvey $10,568.37. The U.S. Trustee then appealed to the Bankruptcy Appellate Panel, which affirmed the award under the state law lien theory, after concluding, like the Bankruptcy Court, that Garvey could not be compensated under § 330. See United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.), 215 B.R. 18, 22 (B.A.P. 9th Cir.1997). The U.S. Trustee appeals from that decision. On appeal, it contends that the Bankruptcy Appellate Panel correctly determined that § 330 precludes compensation to a Chapter 7 debtor's attorney, but that it erred in allowing Garvey compensation pursuant to an attorney's lien under Oregon law. The U.S. Trustee argues that Oregon law does not allow a lien for post-petition services, and that in any event, § 330 preempts Oregon law to the extent that it allows for such a lien in Chapter 7 proceedings.

*2 We review the bankruptcy court's interpretation of the Bankruptcy Code and the Bankruptcy Appellate Panel's conclusions of law de novo. See McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668, 670 (9th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 592, 142 L.Ed.2d 535 (1998); Grey v. Federated Group, Inc. (In re Federated Group, Inc.), 107 F.3d 730, 732 (9th Cir.1997).

II. LEGAL BACKGROUND

To answer the question whether a debtor's attorney can be awarded fees under § 330, we must first attempt to understand the changes to the Bankruptcy Code that give rise to the uncertainty in the statutory scheme. Prior to the passage of the Bankruptcy Reform Act of 1994 (Reform Act), Chapter 7 debtor's attorneys were clearly statutorily eligible to receive compensation from the bankruptcy estate for post-petition services. Specifically, prior to the Reform Act, the first sentence of 11 U.S.C. § 330(a) expressly included attorneys in both of the two places at which the sentence set forth the list of persons eligible to receive distributions under § 330(a):

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney-
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
> (2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a) (1994) (emphasis added).

The Reform Act amended § 330(a) extensively, adding, among other things, more detailed guidance about how a court should determine the reasonableness of fee requests. As it finally emerged from Congress following several floor amendments, the sentence-long Reform Act version of § 330(a)(1) [FN1] did not include "debtor's attorney" at the first place at which the list of persons eligible for compensation appeared, but did continue to expressly include attorneys at the place where the list appeared later in the sentence. [FN2] As amended by the Reform Act, the section now provides:

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

*3 11 U.S.C.A. § 330(a) (West Supp.1999) (emphasis added). Thus, after the 1994 amendment, on the face of the statute the list of persons to whom the court "may award" payments is different from the list of persons to whom the court may provide "reasonable compensation." See 11 U.S.C. § 330(a)(1), (1)(A).

The Second and the Fifth Circuits, as well as several bankruptcy courts, have wrestled with the significance of the Reform Act amendments. The Fifth Circuit and several bankruptcy courts have concluded that the plain language of the Bankruptcy Reform Act unambiguously precludes the award of fees to debtor's attorneys. See Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.), 157 F.3d 414, 425-26 (5th Cir.1998); In re Fassinger, 191 B.R. 864, 865 (Bankr.D.Ore.1996); In re Friedland, 182 B.R. 576, 578-79 (Bankr.D.Colo.1995). Finding the statutory language unambiguous, these courts have either refused to examine the legislative history of the Reform Act altogether, see In re Pro-Snax Distribs., Inc., 157 F.3d at 425-26, or, at the least, have refused to consider the historical evolution of the Bankruptcy Code absent any indication that a literal application of the statute would produce a result demonstrably at odds with the intention of its drafters. See In re Friedland, 182 B.R. at 578. In finding the statutory language unambiguous, however, none of these courts has even mentioned, let alone attempted to explain, the glaring inconsistency in the two listings of eligible persons contained in the single sentence that constitutes § 330(a)(1).

In contrast, the Second Circuit, other bankruptcy courts, and the leading treatise on bankruptcy law have all concluded that § 330(a)(1) should be interpreted to permit the payment of compensation to Chapter 7 debtor's attorneys. See In re Ames Dept. Stores, Inc., 76 F.3d 66, 71-72 (2nd Cir.1996); In re Hodes, 235 B.R. 93, 98-99 (Bankr.D.Kan.1999); In re Bottone, 226 B.R. 290, 297 (Bankr.D.Mass.1998); In re Miller, 211 B.R. 399, 401-402 (Bankr.D.Kan.1997); 3 Collier on Bankruptcy ¶ 330.LH[5] at 375-76 (Lawrence P. King et al. eds., 15th ed. rev.1999). These courts and the Collier treatise all found that Congress's deletion of the term "debtor's attorney" from the first enumeration of eligible persons in § 330(a)(1) was inadvertent, see, e.g., In re Bottone, 226 B.R. at 297, and at least two courts have explicitly rejected the Fifth Circuit's contention that the Reform Act's language is unambiguous. See In re Miller, 211 B.R. at 401-02; In re Hodes, 235 B.R. at 99. In finding the amendment ambiguous, Miller, which is cited with approval in the Collier treatise, emphasized the inconsistency in the two lists contained in § 330(a)(1). See Miller, 211 B.R. at 401-02, cited in 3 Collier on Bankruptcy ¶ 330.LH[5] at 375.

III. DISCUSSION

*4 A careful examination of § 330(a)(1) reveals an unavoidable and substantial ambiguity, which stems from an internal conflict between two different portions of a single sentence. In the sentence-long statutory provision which governs reimbursement from the debtor's estate for post- petition services, the enumeration of those to whom the court "may award" payments includes "a trustee, an examiner, [or] a professional person employed under section 327 or 1103," while the enumeration of those to whom the court may provide "reasonable compensation" includes "the trustee, examiner, professional person, or attorney ...." 11 U.S.C. § 330(a)(1), (1)(A) (emphasis added). Because the first enumeration excludes attorneys, while the second specifically includes them, we cannot avoid the conclusion that the statutory language is substantially ambiguous. [FN3] Nor can we avoid the conclusion that Congress made a drafting error of some kind.

That the statutory language is ambiguous, and that the ambiguity is the result of a drafting error, is bolstered by a close reading of the part of the text setting forth the first list of eligible persons. After the Reform Act amendments, the first listing of eligible persons no longer included debtor's attorneys, which made "a professional person employed under section 327 or 1103" the last category in the amended provision's first listing of eligible persons. To render the amended listing grammatically correct, Congress would have had to insert the conjunction "or" immediately before the now-last category, "a professional person." The amended statute, however, does not do so, and thus there is now no conjunction between the last and the next-to-last items of the first enumeration. See 11 U.S.C. § 330(a)(1). The absence of this conjunction shows, at the least, that some error was made in the drafting of the provision at issue.

Demonstrating that the text of § 330(a)(1) is ambiguous reveals the error of both the Bankruptcy Appellate Panel below and the Fifth Circuit, [FN4] but it does not resolve the question presented in this case. In order to decide whether Garvey may be compensated under § 330, we must directly confront the fact that the statute contains a drafting error, and determine whether the error lies in excluding attorneys from the first list in § 330(a)(1) or in including them in the second. Luckily, the legislative history of the Bankruptcy Reform Act, in conjunction with the language of the predecessor statute, provides us with valuable clues about the meaning of § 330(a)(1). [FN5]

The history of the Reform Act points the way to resolving the ambiguity created by the fact that the listing of persons to whom the court "may award" payments is different from the listing of persons to whom the court may provide "reasonable compensation." See 11 U.S.C. § 330(a)(1), (1)(A). As the provision existed in the statute prior to the introduction of the Reform Act, the two listings were coextensive and both included attorneys. At least as important, the two lists were coextensive in the version of the Reform Act initially introduced in the Senate--both again included attorneys. In fact, as originally introduced, the relevant portion of the proposed new § 330(a)(1) did not change existing law--except that it added a new provision allowing the U.S. Trustee to file objections to fee requests. The initial version of the Reform Act read:

***5** (1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any professional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

S. 540, 103d Cong. § 309, 140 Cong. Rec. s4405-06 (1994) (emphasis added). Subsequently, Senator Metzenbaum introduced an amendment to the Reform Act that became part of the text of the final legislation. See 140 Cong. Rec. s4741-01 (1994). The Bankruptcy Appellate Panel below characterized this amendment as one that omitted the phrase "debtor's attorney" from § 330(a)(1). See In re Century Cleaning Servs., Inc., 215 B.R. at 21. The text of the amendment, however, reveals that the relevant portion did not simply delete the term "debtor's attorney" from § 330(a)(1). Nor was that its fundamental purpose. Rather, it was designed to, and did, consolidate, in a newly created subsection, the newly drafted language in § 330(a)(1) allowing for objections by the U.S. Trustee with another provision that also discussed objections to fee awards, which was contained in the proposed § 330(a)(2)(A)(i). [FN6] See 140 Cong. Rec. s4405-06 (1994). In order to improve the organization of § 330(a) and eliminate any potential redundancy between the two different provisions discussing objections, Senator Metzenbaum's amendment deleted the discussion of objections from both § 330(a)(1) and § 330(a)(2)(A)(i), and added in their place a new § 330(a)(2) which contained a general provision relating to objections, including those by the U.S. Trustee. [FN7]

Coincidentally, the language providing for objections, which Senator Metzenbaum's amendment removed from § 330(a)(1) in the reorganization, was contained in a clause that happened to fall immediately after the term "debtor's attorney," although the two subject matters were entirely unrelated. The material the amendment actually deleted from § 330(a)(1) was as follows:

or the debtor's attorney, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28--

See 140 Cong. Rec. s4741-01 (1994); 140 Cong. Rec. s4405-06 (1994). [FN8] Thus, the material deleted consisted solely of the newly added language that was moved to a new subsection plus the four unrelated words that directly preceded it. Unfortunately, those four words happened to be "or a debtor's attorney."

***6** The fact that attorneys were deleted from the first list by an organizational revision that removed from § 330(a)(1) a considerably larger adjacent and independent provision strongly suggests that the deletion of the first four words resulted from an unintended slip of the pen and not from a deliberate change. It is indeed easy to see how the mistake in the first list could have occurred: in deleting the proposed language relating to the U.S. Trustee, the author of the amendment could simply have crossed out a few too many words. It is equally easy to see how the error was overlooked: it occurred as part of a revision that appeared simply to restore then-existing law by eliminating a proposed new procedure.

The likelihood that the deletion of the four words was inadvertent is increased by the absence of three things one would expect to find had it been deliberate. The first, of course, is the absence of any effort to amend the parallel list in the same sentence, which also contained attorneys. [FN9] The second is the absence of a corollary change to the structure of the first list. As noted above, the amendment failed to add the conjunction "or" between the now-next-to-last and last items of the first list. If Congress's deletion of "debtor's attorney" from the first list had been deliberate, one would have expected it to have included the conjunction in the amendment. Finally, had the deletion of the four words been deliberate, one would expect to find some evidence in the Reform Act's legislative history that Congress intended to remove "debtor's attorney" from the first list in the amendment. Here, there is none. We do not lightly presume that Congress intended to work a substantive change to existing law with an ambiguous amendment. Absent any mention in a statute's legislative history that Congress intended a change, courts ordinarily will refuse to find that ambiguous statutory language significantly alters an existing statutory scheme. See Dewsnup v. Timm, 502 U.S. 410, 419- 20, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Prior to the amendment, § 330(a) included "attorney" in both lists, clearly allowing attorneys in Chapter 7 proceedings to recover fees. The absence of any discussion of the deletion of the term "debtor's attorney" in the legislative history strongly suggests that Congress did not intend to delete that term from either list, or to make any substantive change to that part of the statute.

In contrast to the persuasive evidence that the omission of debtor's attorneys from the first list in § 330(a)(1) was a mistake, there is absolutely no indication that the retention of attorneys in the second list was an error. In fact, all of the relevant evidence supports the conclusion that Congress did not intend to remove the term "attorney" from the second list.

Policy considerations also counsel in favor of allowing attorneys to receive reimbursement under § 330. There are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate. See In re Pine Valley Machine, Inc., 172 B.R. 481, 488 (Bankr.D.Mass.1994) (discussing the post-petition services that debtor's counsel may need to provide). In this case, for example, Garvey filed the conversion petition, prepared schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicated with creditors, and participated in 2004 examinations. Interpreting the ambiguous provision in § 330(a)(1) so as to eliminate the possibility of post-petition compensation for Chapter 7 debtor's attorneys would significantly alter the ability of Chapter 7 debtors to secure counsel in order to perform these services--a fundamental change in bankruptcy law. [FN10] See In re Miller, 211 B.R. at 402; In re Hodes, 235 B.R. at 99; 3 Collier on Bankruptcy ¶ 330.LH[5] at 330-76 to -77. It seems to us especially unlikely that Congress would make such a substantial change to existing law without even so much as mentioning the existence of the change at some point during the process of enacting the Reform Act.

IV. CONCLUSION

*7 The history of the Bankruptcy Code, the legislative history of the Reform Act, and applicable policy considerations all point toward the same conclusion: the drafting error in the Reform Act lies in the deletion of "attorney" from the first list in § 330(a)(1), not the retention of that term in the second. We therefore hold that Garvey is eligible under § 330 for compensation of Chapter 7 post-petition services. Accordingly, we reverse the contrary determination by the Bankruptcy Appellate Panel, and remand so that the appropriate amount of Garvey's compensation under § 330 may be determined. Because we grant Garvey compensation under § 330, we need not decide at this time whether he would also be entitled to those fees under Oregon's attorney retaining lien statute, and therefore vacate that award without prejudice. [FN11]

VACATED, REVERSED, and REMANDED for further proceedings consistent with this opinion.

THOMAS, Circuit Judge, dissenting:

The majority may well have identified the best policy for compensating debtors' attorneys in Chapter 7 cases, but is not the policy choice that Congress made. Because both the plain language of the statute and its legislative history leave no doubt that Congress meant what it said, I respectfully dissent.

I

When interpreting a statute, it is axiomatic that we first must look to its plain language. "In statutory interpretation, the starting point is always the language of the statute itself." Jeffries v. Wood, 114 F.3d 1484, 1494 (9th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). If the language is clear, there is no need to look any further. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

The plain language of § 330(a) is not ambiguous: it precludes an award of attorney's fees to Chapter 7 debtors' attorneys from the bankruptcy estate. Indeed, the Bankruptcy Reform Act of 1994 ("Reform Act") specifically amended § 330(a) by omitting "debtor's attorney" from the list of eligible officers. The amended section provides:

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

11 U.S.C.A. § 330(a) (West Supp.1999).

The unambiguous statutory language should end the discussion, as it did for the Fifth Circuit. See Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.), 157 F.3d 414, 425-26 (5th Cir.1998). However, that this was Congress's intent is bolstered by the structure and history of the Reform Act.

***8** First, although the Reform Act deleted "debtor's attorney" from § 330(a), it specifically permitted bankruptcy courts to award attorney's fees from the bankruptcy estate to Chapter 12 and 13 debtors' attorneys in certain circumstances. See 11 U.S.C.A. § 330(a)(4)(B). Thus, although Chapter 12 and Chapter 13 debtors' attorneys were also affected by the amendment to § 330(a), Congress specifically added a mechanism providing for their compensation. See id. The inclusion of Chapter 12 and Chapter 13 debtors' attorneys in a new section of the statute, coupled with the omission of "debtor's attorney" from the general section, lends support to the conclusion that the choice was deliberate under the statutory construction principle of expressio unius est exclusio alterius (the expression of one thing is the exclusion of the others). Additionally, as the Supreme Court noted in Lindh v. Murphy, 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), "negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."

Second, the deletion of "debtor's attorney" from the legislation occurred after it was introduced. Thus, we should infer as a matter of statutory construction that Congress intentionally rejected the earlier version of the bill. See Russello v. United States, 464 U.S. 16, 23-24, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (holding that when a legislature includes language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the deletion was intentional). The Reform Act, originally introduced in the Senate as Senate Bill 540, contained: (1) the old provision providing professional fee compensation for debtors' attorneys; (2) a new provision in § 330(a)(3)(A) prohibiting courts from authorizing awards of professional fees if the professional services compensated are not reasonably likely to benefit the debtor's estate or necessary in the administration of the case (hereinafter referred to as "the beneficial standard"); and (3) an exception to the beneficial standard in § 330(a)(3)(B) for all individual debtors' attorneys. See S. 540, 103d Cong. § 309, 140 Cong. Rec. S4405-06 (1994).

On April 21, 1994, Senator Metzenbaum introduced amendment 1645 to Senate Bill 540. See 140 Cong. Rec. S4741-01 (1994). The amendment, which replaced the text of the professional fees section, (1) omitted the phrase "debtor's attorney" from § 330(a), and (2) replaced the provision that exempted all individual debtors' attorneys from the beneficial standard with a new provision allowing compensation for Chapter 12 and Chapter 13 debtors' attorneys if their services satisfy the beneficial standard. See id. In making the amendment, Senator Metzenbaum identified professional fees as one of the main problems sought to be addressed by the Reform Act. See 140 Cong. Rec. S14597-02 (1994).

***9** On April 21, 1994, the Senate passed Senate Bill 540, as modified by the Metzenbaum amendment and referred the Bill to the House of Representatives. See 140 Cong. Rec. S4666-02 (1994). In an August 17, 1994 hearing in the House Subcommittee on Economic and Commercial Law, the National Association of Consumer Bankruptcy Attorneys commented on the proposed text of § 330, now contained in House Bill 5116:

> This provision lists specific factors which the court must consider in determining compensation awards to professionals in bankruptcy cases. The provision provides that attorneys for individual debtors in chapter 12 and 13 cases may be awarded reasonable compensation for services rendered to the debtor by emphasizing that the benefit and necessity of such services is an important factor to be considered. This provision further allows any party in interest to move the court to reduce compensation awards. The provision appears to have some minor drafting errors, including the apparently inadvertent removal of debtors' attorneys from the list of professionals whose compensation awards are covered by section 330(a). NACBA does not oppose this provision, since it contains language ensuring that chapter 12 and 13 individual debtors' attorneys may be awarded compensation for their work in protecting the debtor's interests in a bankruptcy case.

Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. and Commercial Law of the Comm. on the Judiciary, 103d Cong. 550-51 (1994) (emphasis added).

Despite having the specific impact of the Senate bill on Chapter 7 debtors' attorneys called to its attention, the House of Representatives passed House Bill 5116, which included the text of § 330 as passed by the Senate. See 140 Cong. Rec. H10917-03 (1994). The Senate then passed House Bill 5116. See 140 Cong. Rec. S14461-01 (1994). The Metzenbaum amendment became a part of the text of the final legislation.

In sum, the plain language of the statute, the legislative history and the ordinary principles of statutory construction lead to the conclusion that the Reform Act removed Chapter 7 debtors' attorneys from those eligible for compensation as professional persons, and that this was an election intentionally made by Congress.

II

Against the evidence of deliberate congressional choice, the majority concludes that the omission of "debtor's attorney" in § 330(a) was an inadvertent scrivener's error that we should correct.

The majority cites the awkward grammatical construction of the statute. However, it is equally likely that the scrivener's error was merely the omission of the word "or" between "examiner" and "professional person" rather than the more substantive omission of the clause "debtor's attorney." Cf. United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 462, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) ("Courts, we have said, should disregard punctuation, or repunctuate, if need be, to render the true meaning of the statute.") (citation and internal quotation marks omitted).

***10** The majority also relies heavily on the fact that the phrase "debtor's attorney" is included in one section and excluded in another. However, this is not illogical. Indeed, it is entirely consistent with the theory that Congress intended to eliminate compensation as a matter of course, but wished to retain the avenue for a Chapter 7 debtor's attorney to receive compensation on appointment by the trustee when the debtor's attorney acts for the estate's benefit. It is quite plausible, and quite likely, that Congress intended Chapter 7 debtors' attorneys to be paid from post-petition earnings in the normal case, and from the estate upon appointment by the trustee when the estate is benefitted.

Even if scrivener's error were found, it does not support the conclusion that Congress actually intended to include debtors' attorneys in § 330. In analyzing a potential scrivener's error, we begin with the presumption that Congress's drafting of the text of a statute is deliberate. See Natural Resources Defense Council v. United States Envtl. Protection Agency, 915 F.2d 1314, 1321 (9th Cir.1990). To find that a statute contains a drafting or scrivener's error, we must determine that "the literal application of [the] statute will produce a result demonstrably at odds with the intention of its drafters." Johnston Envtl. Corp. v. Knight (In re Goodman), 991 F.2d 613, 619-20 (9th Cir.1993) (citations and internal quotation marks omitted). In Goodman, we applied the plain language of a statute over a claim of drafting error because there was a plausible explanation for Congress's choice of text. See id. at 620; see also Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989) (requiring that a court's correction of a statute due to a scrivener's error be predicated on a finding that the application of the plain language of the statute would be absurd).

In this case, as discussed, Congress acted quite deliberately in removing "debtor's attorney" from § 300. One may disagree with this choice, but one cannot say it is irrational. One of the primary considerations in passing the Reform Act was the perceived problems with professional fees. Although the impact of the amendments fall on Chapter 7 debtors' attorneys, there are differences in counsels' duties in Chapter 7 cases compared to Chapter 12 and Chapter 13 cases. See In re Friedland, 182 B.R. 576, 579 (Bankr.D.Colo.1995). In many Chapter 7 cases, there is little for the debtor's attorney to do after the petition is filed. Indeed, prior to the passage of the Reform Act, some courts had unilaterally imposed significant fee restrictions on Chapter 7 debtors' attorneys for reasons similar to those forwarded by the U.S. Trustee in this case. See, e.g., In re Kahler, 84 B.R. 721, 724 (Bankr.D.Colo.1988). This topic also had been the subject of congressional hearings ultimately leading to the passage of the Reform Act. See generally Professional Fees in Bankr.: Hearing Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary, 102d Cong. (1992). Thus, denial of compensation in Chapter 7 cases is not without rationale. This is particularly evident when one considers that under the Reform Act, the bankruptcy trustee can appoint an attorney for the debtor to provide services in the best interest of the estate. See 11 U.S.C. § 327(a), (e). These attorneys remain eligible for compensation under § 330.

***11** For all of these reasons, the denial of post-petition attorney's fees to Chapter 7 debtors' attorneys is not irrational or demonstrably contrary to congressional intent. Accordingly, even if scrivener's error exists, it does not support a statutory reformation.

In short, there is little support for the theory that Congress inadvertently omitted Chapter 7 debtors' attorneys as a result of a scrivener's error; indeed, a fair examination of the circumstances leads to the opposite conclusion.

III

I do not quarrel with the majority's assessment that providing compensation for Chapter 7 debtors' attorneys is the better public policy. As the Second Circuit observed, "[w]here the benefits of services to the estate are the same, it makes no sense to treat performances of such benefits by debtors' attorneys differently than performance by other retained professionals." In re Ames Dep't Stores, Inc., 76 F.3d 66, 72 (2d Cir.1996). It is true that in the typical "no asset" Chapter 7 case, there is little activity after the filing of the petition other than attendance at the section 341 hearing. However, in many cases, the debtor's attorney is called upon to represent the debtor in post- petition adversary proceedings, Rule 2004 examinations, and in reaffirmation hearings. In more complex Chapter 7 bankruptcies, post-petition demands on the debtor's counsel increase dramatically. Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under- represented. The increase in pro se cases, and in cases which become pro se after the petition is filed, does not aid the administration of our bankruptcy system.

Nonetheless, bankruptcy law is code-driven. When Congress makes a policy decision, the debate is concluded. The Reform Act's deletion of Chapter 7 debtors' attorneys from those eligible for compensation under § 330(a) was a deliberate choice we are bound to enforce. The majority errs in concluding otherwise.

Thus, I respectfully dissent.

FN1. As part of the amendments, Congress restructured the subsections of § 330(a), such that § 330(a)(1) of the current Bankruptcy Code corresponds to § 330(a) of the pre-Reform Act Code. When referring to both the pre and post-Reform Act Code, we will refer to the provision as § 330(a).

FN2. The Reform Act applies to all cases commenced on or after October 22, 1994. See The Bankruptcy Reform Act of 1994, Pub.L. No. 103-394, § 702(b)(1) (1994). This case was commenced in September 1995 and is therefore governed by the Act.

FN3. Although the Fifth Circuit advances no arguments to support its assertion that § 330(a)(1) is clear on its face, several bankruptcy courts, including the Bankruptcy Appellate Panel in the instant case, appear to argue that the Reform Act's addition of § 330(a)(4)(B) to the Bankruptcy Code eliminates any ambiguity that exists in § 330(a)(1). See In re Century Cleaning Servs., 215 B.R. at 21; In re Fassinger, 191 B.R. at 865; In re Kinnemore, 181 B.R. at 520. The dissent also advances this argument. Starting with the fact that § 330(a)(4)(B) deals specifically with the compensation of Chapter 12 and Chapter 13 debtor's attorneys, these bankruptcy courts and the dissent contend that a straightforward application of the traditional canon of statutory construction, expressio unius est exclusio alterius, leads inevitably to the conclusion that Congress intended to exclude Chapter 7 debtor's attorneys from compensation under § 330 altogether. This argument, however, misapplies the expressio unius canon and ignores entirely the structure of § 330(a). The argument misapplies the canon because it illogically concludes that the mention of Chapter 12 and 13 debtor's attorneys in a list in subsection (4) of § 330 compels the conclusion that omission of attorneys from one of two lists in subsection (1) should be read as a complete and purposeful omission of attorneys from all of subsection (1). In the context of § 330(a), however, the logic of the canon extends at most only to the conclusion that the Chapter 7 attorneys are excluded from the provisions of subsection (4), not the provisions of subsection (1). The structure of § 330(a) makes this clear: subsection (4) has nothing to do with what parties are generally eligible for reasonable reimbursement (which is the subject of subsection (1)), but instead is concerned with how to calculate the reasonable compensation for those parties. § 330(a)(4)(A) lays out general limits governing the extent of reimbursement, and § 330(a)(4)(B) then carves out an exception to this general rule for determining the extent of reimbursement of Chapter 12 and Chapter 13 debtor's attorneys. See In re Miller, 211 B.R. at 401. The fact that the statute employs a different standard to determine the level of reimbursement for Chapter 12 and Chapter 13 debtor's attorneys certainly does not suggest that other debtor's attorneys are entitled to no reimbursement. To the contrary, it suggests only that the level of reimbursement for other types of debtor's attorneys should be determined under the general rule set forth in § 330(a)(4)(A).

FN4. It is not difficult to see why these courts failed to find the patent ambiguity in § 330(a)(1): they examined only the first part of the critical sentence which makes up the provision and flatly ignored the equally important second part. In re Pro-Snax, 157 F.3d at 425; In re Century Cleaning, 215 B.R. at 21.

FN5. Because the Fifth Circuit found the language of § 330(a)(1) unambiguous, it refused to examine the legislative history altogether. See In re Pro-Snax Distribs., Inc., 157 F.3d at 425-26. While other Bankruptcy courts that have reached the same conclusion as the Fifth Circuit have examined the legislative history of the Reform Act, they have done so through the lens of a strong interpretive presumption, refusing to credit contrary indications in the legislative history unless that evidence "indicat[ed] that [following the 'plain language'] would frustrate Congress's clear intention or yield patent absurdity." See, e.g., In re Friedland, 182 B.R. at 578. The dissent likewise relies on this presumption, which derives from the canon of statutory interpretation set forth in the oft-quoted Supreme Court case Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), which states the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." Id. at 459. This presumption obviously does not apply to § 330(a)(1), however, because by the canon's own terms, it applies only where a statute has a plain meaning that allows for a "literal application." Where, as here, a statute is ambiguous, there is no plain meaning to which a court can apply the presumption.

FN6. Because the provisions were consolidated in the newly created § 330(a)(2), the bulk of the initial version of the Reform Act's § 330(a)(2) became § 330(a)(3) after the Metzenbaum amendment was adopted.

FN7. The Metzenbaum amendment also made other organizational changes to § 330(a). The sentence-long provision in § 330(a)(3)(a) of the initial version of the Reform Act, see Cong. Rec. s4405-06 (1994), for example, was broken down into a subdivided list by the amendment. See § 330(a)(4)(A).

FN8. After this material was deleted, the Reform Act read:

(1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any professional person employed by any such person; and

(B) reimbursement for actual, necessary expenses. 140 Cong. Rec. § 4741-01 (1994).

FN9. The dissenting opinion argues that the inclusion of "debtor's attorney" in the second list but not the first "is entirely consistent with the theory that Congress intended to eliminate compensation as a matter of course, but wished to retain the avenue for a Chapter 7 debtor's attorney to receive compensation on appointment by the trustee." (Dissent at 13726.) It is true that § 327 of the Bankruptcy Code authorizes the trustee to employ various "professional persons," including the debtor's attorney, in certain circumstances. But § 330(a) handles the compensation of these persons straightforwardly--by including "professional person" in both lists of eligible persons. For that reason, there is no need to include "attorney" in the second list in order to preserve the potential for appointment of the debtor's attorney by the trustee. Not only would the inclusion of the term "attorney" for that purpose be superfluous, it would create questions about why Congress did not specifically list the other professional persons eligible for compensation under § 327.

FN10. The U.S. Trustee argues that denying debtor's attorneys § 330 post-petition fees in Chapter 7 proceedings would not prevent the debtor from retaining counsel because the attorney's fees could be paid out of the debtor's post-petition earnings, which do not belong to and are not assets of the estate. See In re Friedland, 182 B.R. at 579 (making the same suggestion). Thus, the Trustee suggests, denying fees under § 330 would not really alter the debtor's ability to retain counsel. The Trustee's argument ignores the likelihood, however, that if a corporate debtor in a Chapter 7 proceeding is defunct, it will have no earnings from which to pay attorney's fees.

FN11. The Oregon law issue would become relevant only if the Bankruptcy Court were to award Garvey less money on remand than it previously awarded him under the state lien theory, a subject on which we are in no position to speculate.

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